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No.

Supreme Court, U.S.
FILED
FEB 20 1987
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

October Term, 1986

CLARENCE MOYER, JR.,
Petitioner,

vs.

RICHARD PE. TY, Sheriff,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Whether the protections of the Fifth Amendment Double Jeopardy Clause as applied to the states through the Due Process Clause of the Fourteenth Amendment, prohibit the State of Ohio from relitigating a defendant's criminal knowledge after that issue had already been determined in favor of the defendant at a previous trial that resulted in an acquittal?

PARTIES

Pursuant to Rule 34.1(b), Rules of the Supreme Court, the parties to this action are listed below:

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Counsel for Petitioner Clarence Moyer, Jr., GERALD J. GLINSEK, JOHN SPIEGLE and ELIZABETH REILLY, at 88 South Portage Path, Suite 301, Akron, Ohio 44303.

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In the Supreme Court of the United States

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ON PETITION FOR WRIT OF CERTIORARI TO THE
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FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE CHIEF JUSTICE AND HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Clarence Moyer, Jr., Petitioner herein, prays that the Writ of Certiorari, be issued to review the decision of the United States Court of Appeals for the Sixth Circuit issued on December 23, 1986.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Sixth Circuit is not published but is reproduced in the Appendix, hereafter A, at A1. The Order of the Court of Appeals granting Petitioner Moyer's Motion to Stay the Issuance of the Mandate is reproduced at A45. The

Opinion of the United States District Court for the Northern District of Ohio, Eastern Division, is not published and is reproduced in the Appendix at A14. The Report and Recommendation of the Magistrate Denying the Petition for Writ of Habeas Corpus is reproduced at A23.

The Entry of the Ohio Supreme Court denying Petitioner Moyer's Motion for Leave to Appeal from the judgment of the Court of Appeals for Richland County is unreported, but is reproduced at A39. The Opinion of the Court of Appeals for Richland County affirming the Richland County Court of Common Pleas' denial of Petitioner Moyer's Motion to Dismiss is unreported but is reproduced at A40. The Entry of the Richland County Court of Common Pleas denying Petitioner Moyer's Motion to Dismiss is reproduced at A44.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1) to review the judgment of the United States Court of Appeals for the Sixth Circuit entered on December 23, 1986.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the United States Constitution provides in pertinent part:

> ". . . (N)or shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . . ."

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> ". . .(N)or shall any State deprive any person of life, liberty, or property, without due process of law; . . . ."

STATEMENT OF THE CASE

In April, 1983, Petitioner Clarence Moyer, Jr., was indicted by the Grand Jury of Summit County, Ohio on eight counts of receiving stolen property (automobile parts). The case was subsequently transferred to Crawford County, Ohio, but will be referred to herein as the Summit County trial. While awaiting trial, Petitioner Moyer was indicted by the Grand Jury of Richland County, Ohio on thirteen counts of receiving stolen property (automobile parts).

In February, 1984, the trial on the Summit County indictment took place. During this trial, the prosecution sought to establish that Petitioner Moyer knowingly purchased stolen automobile parts from one Cory Mathews. Petitioner Moyer testified in his own defense that he had no intent to purchase stolen automobile parts. To attack Petitioner Moyer's credibility, the prosecution called one Charles Long as a rebuttal witness. Mr. Long's testimony was admitted under Ohio Rule of Evidence 404(B) which allows the introduction of evidence of other crimes for the purpose of proving motive . . ., intent, . . . knowledge, . . . or absence of mistake or accident (A47). Mr. Long testified that Petitioner Moyer knowingly purchased stolen automobile parts as well as committed acts that would prevent the tracing of stolen parts (A50-58). The purchases that Mr. Long testified to are the subject of the Richland County indictment. Despite Mr. Long's testimony, Petitioner Moyer was acquitted on all counts of the Summit County indictment.

Subsequent to the Summit County trial, the Richland County prosecutors sought to try Petitioner Moyer on the Richland County indictment. Petitioner Moyer filed a

motion to dismiss the indictment on the ground that a trial under the Richland County indictment would violate his Fifth Amendment rights prohibiting double jeopardy since he had previously been acquitted of receiving stolen property at a trial where the issue of his dealings with Mr. Long had been introduced. On May 22, 1984 the Richland County Court of Common Pleas dismissed Petitioner Moyer's motion.

Petitioner Moyer then appealed to the Court of Appeals for Richland County, Ohio, asserting, as one assignment of error, that the trial court erred in not dismissing the indictment on the grounds of double jeopardy. On November 19, 1984, the Ohio Court of Appeals affirmed the trial court's denial of the motion to dismiss.

Petitioner Moyer then filed a memorandum in support of jurisdiction to the Ohio Supreme Court asserting, once again, that a trial under the Richland County indictment would violate his Fifth Amendment rights prohibiting double jeopardy. On April 10, 1985, the Ohio Supreme Court overruled Petitioner Moyer's motion for leave to appeal and dismissed the appeal.

Petitioner Moyer then filed a Petition for Writ of Habeas Corpus, 28 U.S.C. Section 2254, in the United States District Court for the Northern District of Ohio, Eastern Division, asserting that a trial in Richland County would violate his Fifth Amendment rights against double jeopardy. The District Court referred the case to a Magistrate for a Report and Recommendation. On January 14, 1986, the Magistrate filed a report and recommendation finding that Petitioner Moyer had exhausted his state remedies and that although the Petition was not properly before the Court under 28 U.S.C. Section 2254 because Petitioner Moyer was not in custody pursuant to a judg-

ment, the Petition was properly before the Court under 28 U.S.C. Section 2241. However, the Magistrate recommended that the Writ be denied. On January 27, 1986, Petitioner Moyer filed objections to the Magistrate's report and recommendation. On February 4, 1986, the District Court issued an opinion and entry denying the Writ and dismissing the Petition.

On March 3, 1986, Mr. Moyer filed a Notice of Appeal and a Motion for Issuance of a Certificate of Probable Cause in the District Court. On March 12, 1986, the District Court issued the Certificate of Probable Cause.

Petitioner Moyer perfected a timely appeal to the United States Court of Appeals for the Sixth Circuit asserting that a trial under the Richland County indictment would violate his Fifth and Fourteenth Amendment rights against double jeopardy and the doctrine of collateral estoppel embodied therein. On December 23, 1986, the United States Court of Appeals for the Sixth Circuit issued an opinion and order affirming the District Court's dismissal of the Petition for Writ of Habeas Corpus. On January 12, 1987, Petitioner Moyer filed a Motion to Stay the Issuance of the Mandate pending the filing of a Petition for Writ of Certiorari to this Court. On January 21, 1987, the Court of Appeals issued an order staying the issuance of the mandate through February 21, 1987.

REASONS FOR GRANTING THE WRIT

I. TO ALLOW THE STATE OF OHIO TO RELITIGATE THE ISSUE OF PETITIONER MOYER'S GUILTY KNOWLEDGE IN A SECOND TRIAL, WHEN PETITIONER MOYER HAD BEEN ACQUITTED IN A PREVIOUS TRIAL WHICH HAD DETERMINED THE ISSUE OF GUILTY KNOWLEDGE IN HIS FAVOR, WOULD VIOLATE THE DOCTRINE OF COLLATERAL ESTOPPEL EMBODIED IN THE FIFTH AND FOURTEENTH AMENDMENTS' PROHIBITION AGAINST DOUBLE JEOPARDY.

It is now well established that the concept of collateral estoppel is embodied in the Fifth Amendment's prohibition against double jeopardy. *Ashe v. Swenson,* 397 U.S. 436 (1970). In *Ashe,* this Court held that "when an ultimate issue of fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *Id.* at 443. This Court further explained that:

> ". . . where a previous judgment of acquittal was based upon a general verdict, as is usually the case, this approach requires a court to 'examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration.' The inquiry must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings. . . . Any test more technically restrictive would, of course, simply amount to a rejection of the rule in

> criminal proceedings, at least in every case where the first judgment was based upon a general verdict of acquittal."

Id. at 444 (quoting *Sealfon v. United States*, 332 U.S. 575, 579 (1948).

In the case *sub judice*, Petitioner Moyer raised his claim of issue preclusion to the Richland County indictment after he had been acquitted of receiving stolen property namely automobile parts, in a previous criminal trial in Summit County, Ohio. In the Summit County trial, the prosecution sought to establish that Petitioner Moyer knowingly purchased stolen automobile parts. A review of the record of that trial reveals that Petitioner Moyer did not contest that he purchased the automobile parts in question, nor did he contest that the parts were stolen. The only issue which Petitioner Moyer contested was whether he knew or reasonably should have known that the parts were stolen. During the Summit County trial, Petitioner Moyer testified that he had no intent to purchase stolen parts.

After Petitioner Moyer had testified, the prosecution called Charles Long as a rebuttal witness. Mr. Long testified that he personally stole automobile parts, that Petitioner Moyer purchased stolen parts knowing them to be stolen, and that Petitioner Moyer performed acts that would prevent the tracing of stolen parts. Mr. Long's testimony was admitted under Ohio Rule of Evidence 404(B) which allows evidence of other crimes for the purpose of proving "motive, . . . intent, . . . knowledge, . . . or absence of mistake or accident." The alleged purchases which Mr. Long testified to are the subject of the Richland County indictment. In addition, Mr. Long will be the primary prosecu-

tion witness if Petitioner Moyer is tried under the Richland County indictment.

The Court of Appeals below held that "issue preclusion cannot properly be invoked against the state as to the charges contained in the Richland County indictment" because "(o)nly Petitioner Moyer's knowledge with regard to the parts purchased from Mathews was before the jury" and thus "(p)etitioner's state of mind with regard to his transaction with Long was not an 'ultimate fact' required to be determined . . . in the Summit County (trial)" (Opinion, United States Court of Appeals, A9). However, the Court of Appeals also noted that "the jury may well have rejected Long's testimony in acquitting Moyer."

Petitioner Moyer asserts that in holding that Petitioner Moyer's state of mind with regard to the transactions with Mr. Long was not in issue in the Summit County trial, the Court of Appeals took an overly restrictive reading of this Court's decision in *Ashe, supra.*

Subsequent to this Court's decision in *Ashe,* it has been recognized that the doctrine of collateral estoppel embodied in the Fifth Amendment's prohibition against double jeopardy may function in two distinct ways. First, it may completely bar a second prosecution where one of the facts determined in the first trial is an essential element to the conviction in a subsequent prosecution. Second, collateral estoppel bars the introduction of facts decided in a prior proceeding but does not bar a second prosecution. *See United States v. DeMarco,* 791 F.2d 833, 836 (11th Cir. 1986); *United States v. Lee,* 622 F.2d 787, 790 (5th Cir. 1980), *cert. denied* 451 U.S. 913 (1981). Petitioner Moyer submits that the facts in this case support the first appli-

cation of collateral estoppel as set forth above because Petitioner Moyer's knowledge with regard to his dealings with Mr. Long will be an element essential to prosecution under the Richland County indictment. Furthermore, when presented with a collateral estoppel claim the United States Courts of Appeals have held that resolution of a collateral estoppel claim in the context of a criminal prosecution involves a determination of two questions:

(1) What facts were necessarily determined in the first proceeding, and

(2) Whether the prosecution in a subsequent proceeding attempted or will attempt to relitigate facts decided against it in the first proceeding.

See United States v. Jackson, 778 F.2d 933, 938-939 (2nd Cir. 1985); *United States v. Mock,* 604 F.2d 341, 343 (5th Cir. 1979); *United States v. Gornto,* 792 F.2d 1028, 1031 (11th Cir. 1986).

In making a determination of these two questions, Petitioner Moyer asserts that the practical analysis called for by this Court's decision in *Ashe, supra,* should involve a determination from the jury's point of view of the issue it had to decide to acquit Petitioner Moyer. Furthermore, this determination should involve a realistic examination of the evidence. *United States ex rel. Taylor v. Redman.* 500 F. Supp. 453, 456 (D.Del. 1980). The analysis should decipher exactly what facts have been or *should have been deemed* to have been determined at the first trial. *United States v. Gonzalez,* 548 F.2d 1185, 1191 (5th Cir. 1977) (emphasis added).

In determining what facts were decided in a previous trial, the court should not confine itself to whether there is *any* conceivable legal theory on which the jury could

have based the verdict other than that advanced by the defense. *Redman, supra* at 456 (emphasis added). Additionally when a court is determining the ground of acquittal, it "must not make the defendant's task even more formidable by straining to postulate 'hypertechnical and unrealistic' grounds on which the jury could conceivably have rested its conclusions." *United States v. Mespoulede,* 597 F.2d 329, 333 (2nd Cir. 1979).

In determining what the jury decided in the case at bar, the key is to examine the substance and presentation of Charles Long's testimony. Mr. Long was presented by the Summit County prosecutor as a rebuttal witness. He testified about his prior contact with Petitioner Moyer. This contact was the subject matter of the Richland County indictment *only.* Mr. Long did not testify as to any of the matters which were involved in the Summit County case. If a trial were to proceed in the Richland County case, the substance of Mr. Long's testimony would be the same when he is called to testify against Petitioner Moyer.

Petitioner Moyer submits that since the testimony will be the same in the subsequent trial as that presented in the first trial, a rehash of the evidence will occur. In *United States v. Bowman,* 609 F.2d 12 (D.C. Cir. 1979), the court, in applying the collateral estoppel doctrine, looked to two factors. First, the government had relied on the same evidence to establish both counts in the indictment. The evidence consisted of the testimony of the same three witnesses. *Id.* at 18. Second, the testimony to be introduced at both trials was substantially identical. *Id.*

Both factors the *Bowman* court looked to are present in the case at bar. First, the prosecutors in both Summit and Richland County are relying on Mr. Long's testimony to establish Petitioner Moyer's guilty knowledge. By pre-

senting Mr. Long on rebuttal, the Summit County prosecutor emphasized the need for Mr. Long's testimony to prove her case. Richland County also will be relying on Mr. Long's testimony as to his dealings with Petitioner Moyer. These dealings are the subject matter of the Richland County indictment.

The second factor the *Bowman* court looked to was that the testimony at both trials was substantially identical. This same factor is present in the case at bar. Mr. Long will simply be repeating the substance of his testimony in the Summit County trial in the Richland County case.

In *United States v. Cala*, 521 F.2d 605 (2nd Cir. 1975), the court, in finding no collateral estoppel, looked to one significant fact; the second trial did not amount to a rehash of the evidence presented at the first trial, but was devoted to proof of a different crime involving different evidence. *Id.* at 609. That significant fact is absent from the case at bar; instead, what is present is a rehash of the same evidence, presented to determine the same issue: Petitioner Moyer's guilty knowledge with respect to his transactions with Mr. Long.

Not only is the exact substance of Mr. Long's testimony important for a collateral estoppel determination, but also the effect the testimony had on the jury. As stated previously. Mr. Long was presented as a rebuttal witness. As a result, his testimony was the last evidence the jury heard. In addition and most importantly, his testimony was not confined to the subject matter of the Summit County charges, but introduced the Richland County matters to the jury.

Looking at such testimony from the perspective of the jurors, the jurors could only have been confused about

what they were to determine. First, they were presented with testimony regarding the narrow issue of Petitioner Moyer's guilty knowledge in the Summit County matters. Subsequently, and as the last evidence presented to them, they were confronted with testimony regarding Petitioner Moyer's actions in the Richland County matters. Due to the introduction of this testimony, the jury could only conclude that its determination was being expanded. It was being asked to consider Petitioner Moyer's guilty knowledge as to the Richland County matters as well as the Summit County matters.

In addition to examining the substance and effect of Mr. Long's testimony for collateral estoppel purposes, it is also important to look at the purpose for its introduction. The prosecution introduced Long's testimony pursuant to Ohio Rule of Evidence 404(B) to show absence of mistake or accident on Petitioner Moyer's part when he received the stolen parts. In order to admit the testimony the prosecution had to demonstrate the testimony was relevant. The Comment to Ohio Rule of Evidence 404(B) goes beyond mere relevancy by stating that "evidence is admissible only when that purpose is *inextricably* related to the alleged criminal act." (Emphasis added). This comment emphasizes the strong link that needed to exist between the Richland and Summit County matters.

This link was further strengthened after the prosecution inquired specifically into the details of the Richland County matters including Petitioner Moyer's knowledge. This inquiry crystallized for the jury that its determination was to encompass Petitioner Moyer's guilty knowledge as to all the matters: both Summit and Richland. Thus it is apparent that the jury in the Summit County trial necessarily determined the issue of Petitioner Moyer's criminal knowledge with respect to his

dealings with Mr. Long. Furthermore, because the Summit County trial resulted in an acquittal of Petitioner Moyer, the jury must have determined that Petitioner Moyer did not know or have reason to know that the parts he purchased from Mr. Long were stolen. Additionally, if trial should proceed under the Richland County indictment, the prosecution will seek to relitigate Petitioner Moyer's knowledge with respect to his dealings with Mr. Long.

Petitioner Moyer asserts that because the issue of knowledge was necessarily determined in his favor during the Summit County trial and the prosecution must establish his guilty knowledge as an element of prosecution under the Richland County indictment, a trial under the Richland County indictment would violate the doctrine of collateral estoppel embodied in the Fifth and Fourteenth Amendments' prohibition against double jeopardy.

CONCLUSION

WHEREFORE, for the reasons stated above, Petitioner Moyer prays this Court to grant a Writ of Certiorari to establish that:

1. A trial under the Richland County indictment would violate Petitioner's rights under the Fifth and Fourteenth Amendments and the doctrine of collateral estoppel embodied therein.

Respectfully submitted,

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APPENDIX

OPINION OF THE COURT OF APPEALS FOR THE SIXTH CIRCUIT

(Filed December 23, 1986)

No. 86-3243

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CLARENCE MOYER, JR.,
Petitioner-Appellant,

v.

RICHARD PETTY, Sheriff of Richland County Ohio; Attorney General of the State of Ohio,
Respondents-Appellees.

On Appeal From the United States District Court for the Northern District of Ohio.

Before: GUY, *Circuit Judge,* PECK, *Senior Circuit Judge,* and EDGAR, *District Judge.**

PER CURIAM. Petitioner, Moyer, owner and operator of Moyer's Auto Wrecking, was indicted in Summit County, Ohio, on eight counts of receiving stolen property (auto parts) from an individual named Cory Mathews. While awaiting trial, a second indictment was returned in Richland County charging Moyer with thirteen counts of receiving stolen property at his place of business from one Charles Long and others. Moyer was tried and acquitted

*Honorable R. Allan Edgar, United States District Court, Eastern District of Tennessee, sitting by designation.

on all counts in the first indictment in February of 1984. He then filed a motion to dismiss the Richland indictment before the trial court, claiming double jeopardy, which was overruled. In November of 1984, the state court of appeals affirmed the trial court's denial of the motion to dismiss and in March of 1985, the Ohio Supreme Court denied petitioner's motion for leave to appeal and dismissed the appeal. Moyer then sought habeas corpus relief pursuant to 28 U.S.C. § 2254 before the federal district court, which denied the petition. A timely appeal to this court followed. For the reasons set forth below, the decision of the district court is affirmed.

I.

At Moyer's trial on the first indictment, the state presented testimony by Cory Mathews regarding his delivery of stolen auto parts to defendant. Moyer then testified that he had indeed purchased the parts from Mathews and resold them. However, he testified that he had no knowledge that the parts were stolen and therefore lacked the requisite intent:

Q. Are you testifying today that you had no intent to purchase stolen car parts from Cory Mathews?

A. I had no intent of buying stolen parts.

Q. But, you don't recall it so therefore if you did purchase from him it was an accident or a mistake. Is that what you are saying?

A. If I bought them, it was an accident or a mistake.

Q. So therefore, you never had any knowledge that you did this, correct?

A. Not intentionally, no.

Q. It was never your motive or scheme to make extra money by buying the stuff real cheap?

A. No.

The prosecution received permission from the trial judge to present the testimony of Charles Long in rebuttal. Although Long's testimony related only to his dealings with defendant in Richland County, which is the subject of the Richland indictment, it was allowed in the Summit County case pursuant to Ohio R. Evid. 404(B)[1] to show absence of mistake and to impeach defendant's credibility.[2] Long's testimony specifically attacked Moyer's state-

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1. Ohio R. Evid. 404(B), which is identical to Fed. R. Evid. 404(b), is as follows:

RULE 404. Character Evidence not Admissible to Prove Conduct; Exceptions; Other Crimes

. . . . .

(B) Other crimes, wrongs or acts. Evidence whether crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may however, be admissible for the other purposes, such as proof of motive, opportunity, extent, preparation, plan, knowledge, identity or absence of mistake or accident.

2. The conference with the trial judge regarding the admissibility of this testimony was as follows:

Mr. Spiegel [counsel for defendant]: Your Honor, referring to 404(B) and 2945.59 in the Evidence Rules it says, in part, evidence of other crimes is not admissible to prove character. And it says it may be admitted for the purpose of showing motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. She is, I believe, trying to prove character here.

Ms. Powers [counsel for state]: Your Honor, it goes to prove motive. He was dealing out of his pocket. He never looks at the parts because he knows he can make some money on them. It sounds to me like it was his intent to buy stolen goods. I can clearly show that he knowingly received stolen property and that he knowingly issued phoney receipts and made sure VIN numbers were punched out and painted over. I can clearly show that he has told people to keep

(Continued on following page)

ments that he had never purchased stolen parts, never primed over vehicle identification numbers on automobile engines, and never removed federal stickers. Long testified that he had delivered stolen engines to defendant and had discussed the fact that the stickers and numbers had been removed.

It is Long's testimony that forms the basis for Moyer's appeal. He contends that the testimony given by Long in the Summit County case is the same as that which would be introduced to prove the charges contained in the Richland County indictment. He further argues that the identical issue of his "guilty knowledge" will be central to the subsequent case and, since that issue has been decided favorably to him (as evidenced by his acquittal), relitigation of this issue violates the principle of collateral estoppel and should therefore be barred.

II.

Initially, we note that Moyer's petition for habeas relief was improperly brought under 28 U.S.C. § 2254. That section applies only in post-trial situations to petitioners in custody "pursuant to the judgment of a state court." 28 U.S.C. § 2254(b) (1982). However, Moyer

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Footnote continued—

> their mouth shut about this operation and this is someone who has known him for fifteen years.
>
> . . . . .
>
> Ms. Powers: This is in addition. No one ever told me the Defendant was going to testify and I didn't get upset about it. He denied everything so, you know, he is entitled to be breached on that. It goes to prove the Defendant's motive and monetary gain. I believe he stated himself, "I knew I could make some money on them, so I don't look at them."
>
> The Court: He said, "If I purchased them, I purchased them by mistake." She is trying to show absence of mistake. Overruled.

is seeking pretrial relief. The magistrate to whom the district court referred this case proceeded to consider the petition pursuant to the provisions of 28 U.S.C. § 2241(c)(3),[3] finding that justice required consideration of the petition solely on the ground that a claim of double jeopardy was asserted.

We have acknowledged that the constitutional defense of double jeopardy represents an extraordinary circumstance warranting pretrial habeas review. *Gully v. Kunzman*, 592 F.2d 283, 286 (6th Cir. 1979), *cert. denied*, 442 U.S. 924, *reh'g denied*, 444 U.S. 889 (1979). Although petitioner's claim of collateral estoppel or issue preclusion does not technically involve a claim of double jeopardy, the Supreme Court has held that "this established rule of federal law [i.e., issue preclusion] is embodied in the fifth amendment guarantee against double jeopardy" as applied to the states through the fourteenth amendment in *Benton v. Maryland*, 395 U.S. 784 (1969). *Ashe v. Swenson*, 397 U.S. 436, 445 (1970). Therefore, Moyer's claim of issue preclusion is likewise cognizable under 28 U.S.C. § 2241(c)(3), subject, of course, to the same constraints dictated by considerations of federalism as claims involving double jeopardy. *Braden v. 30th Judicial Circuit Court of Kentucky*, 410 U.S. 484, 489-91 (1973). Therefore, exhaustion of state remedies is a prerequisite to federal intervention

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3. § 2241. *Power to grant writ*

. . . . .

(c) The writ of habeas corpus shall not extend to a prisoner unless—

. . . . .

(3) He is in custody in violation of the Constitution or laws or treaties of the United States;

Petitioner's release on his own recognizance pending trial constitutes "custody" eligible for the protection of the writ of habeas corpus. *Delk v. Atkinson*, 665 F.2d 90 (6th Cir. 1981).

under both sections 2254 and 2241. *Atkins v. Michigan,* 644 F.2d 543, 546 (6th Cir. 1981). Since petitioner has exhausted his state remedies with regard to his claims of issue preclusion, we find that federal review is appropriate despite the fact that he improperly categorized his claim as one for post-conviction relief. *Gully,* 592 F.2d at 287. Such review is necessary to fully satisfy the goal of the double jeopardy prohibition, which is avoidance of "the risk or hazard of trial conviction." *Price v. Georgia,* 398 U.S. 323, 331 (1970). The Supreme Court has counseled that "if a criminal defendant is to avoid *exposure* to double jeopardy and thereby enjoy the full protection of the Clause, his double jeopardy challenge . . . must be reviewable before that subsequent exposure occurs." *Abney v. United States,* 431 U.S. 651, 662 (1977). Since the identical policies animate a claim of issue preclusion, federal review is equally appropriate.

III.

Two separate theories are encompassed in Moyer's claim of issue preclusion. First, he contends that the issue of his "guilty knowledge," i.e., knowledge or reason to believe that parts he purchased were stolen, in his transactions with Charles Long which are the substance of the pending Richland County indictment was placed before the jury in the first trial when Long testified. Therefore, he argues, since the state placed petitioner's knowledge in the Long transactions in issue, and since the jury acquitted him, they necessarily believed that he did not know that the Long transactions involved stolen property.

Second, Moyer contends that, since both indictments relate to his method of operating his salvage business, and since that business constitutes a single course of conduct on his part, his acquittal in the Summit County case should

stand as an acquittal of all allegations that he operated his business by knowingly receiving stolen automobile parts. He claims that the focus should not be on his individual transactions with Long or Mathews, but on his "continuing mental state," since the prosecution put his "continuing mental state" in issue by supplementing Mathew's testimony with that of Long. He asserts, therefore, that although the two indictments contain separate and distinct individual transactions, only one mental state was considered by the jury—his guilty knowledge as to *both* the Summit and Richland County indictments. We deal with petitioner's allegations seriatim.

A. *The Intent Issue*

In constitutionalizing the doctrine of issue preclusion as encompassed within the double jeopardy clause of the fifth amendment, the Supreme Court held that "when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *Ashe v. Swenson*, 397 U.S. 436, 443 (1970). In assessing claims of issue preclusion in those cases where acquittal was based upon a jury's general verdict, as in the case at bar, the Court specified that a reviewing court must

> "examine the record of a prior proceedings, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration." The inquiry "must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings."

Id. at 444 (quoting *Sealfon v. United States*, 332 U.S. 575, 579 (1948)). In making this inquiry, it is important to

note that issue preclusion can exist only as to those precise factual determinations which were previously litigated and essential to the judgment.[4] Once petitioner establishes a non-frivolous double jeopardy claim, the burden of proof shifts to the government to show it is not attempting to prosecute the same offense.[5] *United States v. Jabara*, 644 F.2d 574, 576-77 (6th Cir. 1981).

The test set forth by the Supreme Court in *Ashe* requires us to determine

> (1) the precise issue or issues which petitioner claims have been decided and which he now seeks to foreclose from consideration in the subsequent prosecution, and
>
> (2) whether a rational jury could have grounded its verdict upon an issue other than that which petitioner proffers.

At Moyer's trial, he was charged under Ohio Rev. Code § 2913.51(A) with

> (1) receiving property of another (from Cory Mathews)
>
> (2) knowing or having reasonable cause to believe
>
> (3) the property was stolen.

During trial, Moyer freely admitted to having purchased the auto parts in question from Mathews, and Mathews testified that the parts sold to Moyer had, in fact, been stolen. Therefore, the only contested element of the crime charged was Moyer's knowledge and inferentially his

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4. *See generally* Vestal, *Issue Preclusion and Criminal Prosecutions*, 65 Iowa L. Rev. 281 (1980).

5. For a discussion of burden of proof problems in double jeopardy and issue preclusion cases, see Note *The Burden of Proof in Double Jeopardy Claims*, 82 Mich. L. Rev. 365 (1983).

intent to purchase stolen parts. Moyer argues that, as a result of the introduction of Long's testimony, the scope of the issue of his intent expanded to include not only his knowledge in the Summit County case but also the matters involved in the Richland County indictment. Therefore, he claims that the jury's acquittal necessarily decided the issue of his intent to purchase stolen parts from Long as well as Mathews; since the only disputed issue in the subsequent indictment will be that of his knowledge that the parts he purchased from Long were stolen, he seeks to foreclose that issue and thereby bar the Richland County prosecution.

While Moyer's state of mind was clearly the central issue in his trial, Long's testimony was offered solely to rebut his denial of guilty knowledge and to show absence of mistake. While we acknowledge that the jury may well have rejected Long's testimony in acquitting Moyer, his guilt or innocence of the crimes alleged by Long was not before the jury nor was the jury required to decide that issue. Only Moyer's knowledge with regard to the parts purchased from Mathews was before the jury, and his acquittal may have been based on their decision that Mathews' testimony was not credible. Petitioner's state of mind with regard to his transactions with Long was not an "ultimate fact" required to be determined by the jury trying the charges in the Summit County indictment; therefore, issue preclusion cannot properly be invoked against the state as to the charges contained in the Richland County indictment.

B. *The "Same Offense" Issue*

Moyer's contention here is that his business transactions constitute a single, continuing course of conduct and,

since his acquittal resulted in a finding of lack of guilty knowledge in his business dealings in general, the state should be barred from reprosecuting him in another county.

One of the primary guarantees of the double jeopardy clause is that of barring a state, a single sovereign, from making repeated attempts to convict an individual in different courts for acts which constitute the "same offense." *Waller v. Florida,* 397 U.S. 387 (1970).[6] A single course of conduct occurs when the incidents were part of the same criminal episode. *Dombkowski v. Johnson,* 488 F.2d 68 (6th Cir. 1973). Thus, the Ohio courts have held that a single course of criminal conduct exists in the crime of receiving stolen property when the "defendant had no knowledge of the number of thefts and received the property in a single continuous transaction *from the same source* at the same time." *State v. Sanders,* 59 Ohio App. 2d 187, 192-93, 392 N.E.2d 1297, 1301-02 (Ct. App. 1978) (emphasis added).

Petitioner relies heavily on the case of *United States v. Robinson,* 588 F.2d 1041 (5th Cir.), *cert. denied sub nom. Miller v. United States,* 440 U.S. 982 (1979), as support for his theory. *Robinson* involved an illegal gambling business prosecuted by the government under 18 U.S.C. § 1955, which required that the business be in operation for a period in excess of thirty days or have a gross revenue of $2,000.00 in any single day and involve five or more persons in the operation of the business. The government sought conviction of the same individuals based on their gambling activities in the Dallas-Fort Worth area after they had been convicted on charges relating to interdependent

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6. For a thorough review of double jeopardy offense-defining tests, *see* Note, *Twice in Jeopardy,* 75 Yale L. J. 262 (1965).

operations in Amarillo, Texas. *See United States v. Clements,* 588 F.2d 1030 (5th Cir.), *cert. denied sub nom. Miller v. United States,* 440 U.S. 982 (1979). In barring the second prosecution, the court specifically noted that, in obtaining the first conviction, the government had relied on the entire network of operations, including the Dallas-Fort Worth area, in aggregating the requisite number of participants under the statute. *Robinson,* 588 F.2d at 1044. Therefore, the court found that the second prosecution involved the same continuing course of criminal activity of which defendants had already been found guilty. *Id.*[7] Reasoning by analogy, Moyer contends that his earlier acquittal has, in effect, immunized his business from further prosecution for receipt of stolen property, even though received from a separate individual.

We find petitioner's reliance upon *Robinson* to be misplaced. That case is readily distinguishable in that it clearly involved a network of illegal operations being conducted from various cities. In the first prosecution, the government had chosen to aggregate these various operations to satisfy the requisites of the applicable statute. However, Moyer's business is conducted from one location, although he deals with suppliers from different areas of the state. It defies logic to say that because one is determined to be free of guilt for transactions with one individual occurring during one six month period, this auto-

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7. In so holding, the court pointed out that

> [w]here the evidence shows a substantial linkage between two independent operations, the Government may treat the operations as one business for purposes of 18 U.S.C.A. § 1955. If if [sic] chooses to do so, it may include all persons involved in the interrelated operations to arrive at the prerequisite five. It may not, however, without more treat the same persons as being involved in separate businesses in another prosecution to avoid double jeopardy.

Robinson, 588 F.2d at 1044.

matically translates to a finding of innocence in the conduct of his business for the foreseeable future. We agree with the magistrate who, in rejecting Moyer's argument, explained that the evidence presented in his first trial could not have established one transaction with a single source, since each indictment covered transactions with only one source. Furthermore, the two indictments cover different time periods (with a slight overlap of two weeks), and it was clear that Mathews and Long transacted their business independently with Moyer. Clearly, petitioner's status as owner and operator of a business cannot insulate him from prosecutions involving factually distinct business transactions. Neither can a verdict as to his state of mind in his dealings with one individual shield him as to transactions with others through the assertion that all his business dealings in the course of operating his single business constitute the "same transaction."

AFFIRMED.

ISSUED AS MANDATE: January 15, 1987

COSTS: None

JUDGMENT ENTRY OF THE UNITED STATES DISTRICT COURT

(Filed February 4, 1986)

Case No. C85-1585A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CLARENCE MOYER,
Petitioner,

vs.

RICHARD PETTY,
Respondent.

JUDGMENT ENTRY

For the reasons set forth in the Memorandum Opinion filed contemporaneously with this Judgment Entry, IT IS HEREBY ORDERED, ADJUDGED, and DECREED that the petitioner's request for habeas corpus relief is denied and this action is dismissed.

/s/ D. D. DOWD, JR.
David D. Dowd, Jr.
U. S. District Judge

MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT

(Filed February 4, 1986)

Case No. C85-1585A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CLARENCE MOYER,
Petitioner,

vs.

RICHARD PETTY,
Respondent.

MEMORANDUM OPINION

The petitioner has filed a petition seeking habeas corpus relief pursuant to 28 U.S.C. § 2254 from his pending trial in the Common Pleas Court of Richland County for thirteen counts of aiding and abetting others to receive, retain, and dispose of stolen automobile parts in Richland County, Ohio, in violation of Ohio Revised Code, Section 2913.51(A). The Court referred the case to Magistrate Charles R. Laurie for a report and recommendation. Magistrate Laurie has filed a recommendation with the Court recommending that the petition be dismissed, after proceeding to consider the petition pursuant to the provisions of 28 U.S.C. §2241(C)(3), and after concluding that the petitioner had exhausted state remedies in appealing unsuccessfully the decision of the Common Pleas Court of Richland County which refused to dismiss the indictment upon the petitioner's claim that he was entitled to

such a dismissal based upon his claim that to stand trial in Richland County would subject the petitioner to double jeopardy in violation of the U.S. Constitution.

The petitioner was earlier tried and acquitted of similar charges of receiving and disposing of stolen automobile parts in the Common Pleas Court of Crawford County. In that trial, the prosecution presented testimony of Charles Long pursuant to the provisions of Rule 404(B) of the Ohio Rules of Evidence which allows for the admission of testimony of other crimes to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. In the Crawford County case, the petitioner was charged with dealing with one Cori Mathews. The petitioner testified and admitted that he acquired the automobile parts in question from Cori Mathews, but denied knowing that the automobile parts were stolen. The Richland County indictment against which the petitioner now seeks to apply the defense of double jeopardy involves the crime about which the witness Charles Long gave testimony.

In recommending that the petitioner's request for habeas relief be denied, Magistrate Laurie agreed with the finding of the Fifth District Court of Appeals for Ohio which denied petitioner's appeal from the denial of his motion to dismiss the Richland County indictment on the basis of double jeopardy and in so doing ruled:

> The crimes appellant was acquitted of in Crawford County . . . involve separate and distinct factual transactions from those involved in the Richland County indictments. We find that Clarence Moyer's mental state, if in fact he received parts from Cori Mathews, is distinct and separate from his mental state when dealing with, if he did deal with, Charles Long. There

is no evidence before the court to show that appellants' alleged acts in both indictments were of a continuous course of conduct. Furthermore, the two jurisdictions did not indict at the same time or treat the two cases as one.

Counsel for the petitioner has filed objections to Magistrated [sic] Laurie's report and recommendation as follows:

OBJECTION ONE - The Magistrate erred in not finding that the issue of knowingly purchasing stolen property from Charles Long was decided in petitioner's favor in the first trial.

OBJECTION TWO - The Magistrate erred in finding that the issue petitioner seeks to foreclose is that "Petitioner *did not purchase* stolen automobile parts from Charles Long." p.12. Petitioner seeks to foreclose the issue stated in his petition and restated by the Magistrate: "his *knowledge* in purchasing stolen automobile parts from Charles Long." p.9 (emphasis added).

Only by relying upon the wrong issue was the Magistrate able to find that the first jury did not acquit petitioner on the issue now sought to be foreclosed.

OBJECTION THREE - The Magistrate erred in finding that the first jury "could have grounded its verdict upon . . . (the) issue, whether Petitioner purchased stolen automobile parts from Cory Mathews." p.13. Petitioner did not contest that the parts were stolen nor that he purchased them from Mathews. Petitioner contested *only* the element of knowledge. The jury necessarily found that petitioner did not *know* the parts he purchased were stolen.

To decide that issue in petitioner's favor, the jury had to believe his testimony. To believe his testimony, the jury had to disbelieve Charles Long's testimony on guilty knowledge. The prosecution has consistently relied on Long's testimony at proof 1) of petitioner's guilty knowledge in both sets of transactions and 2) of petitioner's lack of credibility in denying guilty knowledge in both sets of transactions. Return of Wrig p. 1.

OBJECTION FOUR - The Magistrate erred in not finding that both indictments are based on "one course of criminal conduct." The Magistrate focused upon the sellers of property, rather than upon the petitioner purchaser, as the relevant "operations" for the course of conduct. pp. 14-15.

The petitioner's first three objections focus on that narrow issue presented to the Crawford County jury. Did the petitioner have guilty knowledge with respect to the times of receiving and disposing of the stolen automobile parts in question. The jury's acquittal speaks to that issue favorably for the petitioner. The petitioner then reasons that because the prosecution presented Rule 404(B) evidence of other, but similar crimes, (i.e., the testimony of Charles Long), that testimony was likewise rejected and thus the petitioner should not be put to the task of facing the Long testimony in a second trial because of the protections afforded by the double jeopardy provisions in the constitution. In the Court's view, it is the contention of the petitioner that where the sole contested issue in a criminal case is decided favorably for the petitioner by way of an acquittal, that acquittal stands as a double jeopardy defense against any subsequent trial involving alleged separate crimes for which Rule 404(B) evidence was presented to the jury providing the Rule 404(B) evidence went directly to the sole issue in dispute at the first trial. In the petitioner's case, guilty knowledge was the issue and the testimony of Long was presented to rebut the petitioner's denial of guilty knowledge. In this Court's view, the extension of the double jeopardy rule to such a

situation would be novel and without precedent. The Court acknowledges that the jury in the first case may well have rejected the testimony of Long, but the petitioner's guilt or innocence on the crimes alleged by Long was not before the jury nor was the jury required to decide on that issue. In fact, the jury could have believed the Long testimony and still have acquitted if they decided the testimony of Cori Mathews was not credible. In sum, the Court is of the belief that the rule against double jeopardy is to be applied where certainty, not speculation is the basis. The Court finds that the first three objections are without merit.

In support of the fourth objection, the petitioner contends that the acquittal in the case prosecuted in Crawford County stands as a determination that the petitioner's junkyard business has been acquitted of the allegation that it was operated by the petitioner by knowingly receiving stolen automobile parts. Building on that proposition, the petitioner contends that the decision in *United States v. Robinson*, 588 F.2d 1041 (5th Cir. 1979) and *State v. Sanders*, 59 Ohio App. 2d 187 (1978) support the petitioner's position. In the Court's view, both *Robinson* and *Sanders, supra,* are inapposite.

Petitioner's reliance upon *Sanders* is not justified. In *Sanders,* the defendant was convicted of four counts of receiving and concealing stolen property. The evidence demonstrated that the defendant had in his possession four separate items of stolen property, each in his automobile. Because the items were received at the same time from the same source, the Court held that the possession constituted one crime, not four crimes. Judge Victor's opinion in *Sanders,* which includes an analysis of Ohio law, supports the respondent's position in this case:

The state argues that Sanders' one act of receiving stolen property is "four * * * offenses of the same kind * * *" committed with a separate animus under R. C. 2941.25(B). The prosecution compares the instant situation to cases of robbery and larceny and contends that the number of victims invariably determines the number of crimes charged. We disagree.

In *Smith v. State* (1898), 59 Ohio St. 350, our Supreme Court negated the equation between the number of victims and the crimes charged when there is only a singular criminal act involved. In *Smith v. State, supra,* cited with approval in *State v. Botta* (1971), 27 Ohio St.2d 196, the high court was faced with the exact inverse of the instant case. It held that the receiving or concealing of different articles of property at different times and on separate occasions are distinct offenses and cannot be prosecuted as one crime. The court in *Smith v. State, supra,* elaborated further at page 358:

"* * * While it is true that the stealing from different owners at different times, however slight the interval, constitute several offenses, a larceny of several articles may be committed by the same act, so as to constitute but one offense, though they are the property of different owners."

Applying this rationale here, we hold that the defendant, as a matter of law, cannot be convicted of four separate crimes of receiving stolen property, when he received the items at the same time, from the same source in the same transaction. While the state proved beyond a reasonable doubt that defendant is guilty of one count of receiving stolen property, they offered no evidence to show that defendant harbored a sepa-

rate animus toward each individual owner, or that Sanders participated in the commission of the original theft offenses.

Robinson, supra, involved an illegal gambling business prosecuted under the provisions of 18 U.S.C.A. § 1955 which required as one of the elements that the business be in operation for a period in excess of thirty days or have a gross revenue of $2000.00 in any single day and involve five or more persons in the operation of the business. In sum, the defendants in *Robinson* were successful in demonstrating that a previous conviction as reported in *United States v. Clements,* 588 F.2d 1030 (5th Cir. 1979) covered the same business prohibited by the statute and thus the defense of double jeopardy was successful in the second prosecution because the Court of Appeals for the Fifth Circuit found that the same gambling activity was involved in the second conviction. In this case, the petitioner contends that his junkyard business should be compared to the illegal gambling operation. In sum, the petitioner contends that the earlier acquittal in Crawford County has now immunized the junkyard from further prosecution for the offense of receiving stolen automobile parts from another person, i.e., Charles Long. The Richland County Common Pleas Court, the Court of Appeals for Richland County, Magistrate Laurie, and now this Court disagree.

Magistrate Laurie addressed the question of whether the alleged Mathews and Long sales were connected and concluded they were not as he declared:

> This Magistrate finds that the state is not attempting to separate charges and pursue them separately in different counties. The evidence presented in the Crawford County trial could not have established that

there was one transaction from the same source. There were at least two independent sources, Cori Mathews and Charles Long. Furthermore, the charges in the two counties are based on different episodes. There is no evidence in the record that the alleged acts of receiving stolen property occurred simultaneously or were somehow part of the same transaction. There is no evidence that Cori Mathews and Charles Long knew of one another before the indictments. From the evidence presented in Crawford County the only reasonable conclusion was that Cori Mathews and Charles Long transacted their business independently with Petitioner and not as "one course of criminal conduct."

The Court finds Magistrate Laurie's analysis to be correct. In the objections filed by the petitioner that factual analysis is not challenged, but rather the petitioner relies upon the argument that petitioner's status as a junkyard operator applies.

The Court overrules the objections of the petitioner and approves the report and recommendation of the Magistrate. The petitioner's request for relief is denied and this action is dismissed.

IT IS SO ORDERED.

/s/ DAVID D. DOWD, JR.
U. S. District Judge

REPORT AND RECOMMENDATION OF MAGISTRATE

(Filed January 14, 1986)

Civil Action No. C85-1585-A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CLARENCE MOYER, JR.,
Petitioner,

VS.

RICHARD PETTY, SHERIFF, RICHLAND COUNTY, OHIO,
Respondent.

REPORT AND RECOMMENDATION OF MAGISTRATE

Petitioner, Clarence Moyer, Jr., initiated this action for habeas corpus relief pursuant to Title 28, United States Code, section 2254, on June 3, 1985. This action was brought against both Richard Petty, Sheriff of Richland County, Ohio, and the Attorney General of the State of Ohio. On June 6, 1985 Respondents were ordered to move or answer within twenty days. The attorney general moved for his dismissal as a party to this case and this motion was granted by United States District Judge David D. Dowd, Jr. on September 18, 1985. On October 30, 1985 pursuant to local rules Judge David D. Dowd, Jr. referred this case to this Magistrate for supervision and preparation of a written report containing a recommended disposition of this action. This Magistrate noted that Richard Petty,

Sheriff, had not responded to the petition. Review of the docket of the United States District Court Clerk's Office revealed that a copy of the petition and subsequent motion for dismissal as a party by the attorney general had never been sent to Richard Petty, Sheriff. On November 6, 1985 this Magistrate ordered that a copy of the petition, and all motions and orders, be sent forthwith, and that Respondent move or answer within twenty days. On November 29, 1985 Respondent filed a motion for extension of time in which to answer citing as cause that Respondent's counsel had been on vacation and did not become aware of this Magistrate's order to respond until November 25, 1985. This request for extension of time was granted on December 3, 1985. On December 19, 1985 the Respondent's return of writ was filed.

HISTORY OF PROCEEDINGS

In April, 1983 Petitioner was indicted in Summit County, Ohio for receiving various parts of stolen automobiles at his place of business in Crawford County, Ohio. Petitioner challenged the jurisdiction in Summit County Common Pleas Court, and Common Pleas Judge Glen B. Morgan transferred the case to Crawford County, characterizing this order as a change of venue. Trial before a jury was held in Crawford County on the Summit County indictment with Summit County Common Pleas Judge Glen B. Morgan presiding and a Summit County prosecutor representing the state. Petitioner was acquitted by the jury of all charges in February, 1984.

The Richland County Grand Jury indicted Petitioner during the September, 1983 term on thirteen counts of aiding and abetting others to receive, retain, and dispose of stolen automobile parts in Richland County, Ohio, in violation of Ohio Revised Code, section 2913.51(A). Moyer's

Auto Wrecking was also charged in the same indictment for aiding and abetting others to receive, retain and dispose of stolen property. On March 9, 1984 Petitioner and Moyers Auto Wrecking filed a motion to dismiss claiming double jeopardy due to the acquittal by the jury in Crawford County and a motion to dismiss alleging that the Richland County grand jury had no jurisdiction to hand down an indictment. On May 22, 1984 the Richland County Common Pleas Court overruled the motion to dismiss because of former jeopardy and on June 6, 1984 the court overruled the motion to dismiss due to lack of jurisdiction. *State v. Moyer,* Case No. 83 CR 359 (Richland County Common Pleas Court). Petitioner has not been tried in Richland County. Petitioner is under a continuing recognizance bond from that trial court.

Petitioner perfected an appeal to the Ohio Court of Appeals for Richland County, Fifth Appellate District, raising the following two assignments of error:

I. The trial appellants' court erred in overruling defendant-appellants' motions to dismiss the indictment, because indicting these defendants violated their right to be free from double jeopardy.

II. The trial court erred in overruling defendant-appellants' motions to dismiss the indictment because the Richland County Common Pleas Court lacked subject-matter jurisdiction over alleged crimes committed in another county.

In an opinion dated November 19, 1984 the court of appeals overruled Petitioner's assignments of error and affirmed the trial court's denial of the motions to dismiss. *State v. Moyer,* Case No. CA-2245 (Fifth Appellate District, 1984). Petitioner then filed a memorandum in sup-

port of jurisdiction in the Ohio Supreme Court. In his memorandum Petitioner cited the following propositions of law:

1. The double jeopardy provisions of the fifth amendment protect a defendant from an attempt to relitigate the single dispositive issue of intent, where such issue has already been litigated, resulting in acquittal.
2. The double jeopardy provisions of the fifth amendment forbid trying a defendant twice when the crime charged is part of one continuous course of conduct.
3. If a trial court determines that an indictment attempts to indict a defendant for crimes committed in another county, the court must dismiss the indictment for lack of subject-matter jurisdiction.

The Richland County prosecuting attorney filed a memorandum in opposition to jurisdiction on March 4, 1985. On April 10, 1985 the Supreme Court of Ohio overruled the motion for leave to appeal and dismissed the appeal. *State v. Moyer,* Case No. 85-0066 (Ohio Supreme Court, 1985).

The Petitioner with counsel is now before the United States District Court for the Northern District of Ohio, Eastern Division, seeking federal habeas corpus relief. As his sole ground for relief, Petitioner makes the following allegation:

Ground one: Custody in violation of the Fifth Amendment guarantee of freedom from being placed twice in jeopardy (collateral estoppel). Petitioner was previously acquitted by a jury based upon lack of the element of criminal intent.

Facts: Petitioner has been held for trial in Richland County, Ohio since August, 1983. On February 03, 1984, Petitioner was acquitted of knowingly operating his Crawford County junkyard as a conduit for stolen automobile parts. At this prior trial, petitioner did not contest 1) that the parts were stolen; 2) that he purchased them from the thieves; or 3) that he sold them. His sole defense, dependent upon his credibility, was lack of knowledge or reason to believe that the parts were stolen. The state challenged petitioner's intent and credibility by cross-examining him with respect to stolen parts purchases from Charles Long. Petitioner agreed he had bought the parts from Long, but without knowing they were stolen. Long testified that petitioner knew the parts were stolen.

The jury believed petitioner, disbelieved Long, and acquitted petitioner.

The transactions about which Charles Long and petitioner testified in the prior trial form the bases of the indictment under attack. The single dispositive issue of petitioner's guilty knowledge in these transactions with Charles Long has already been resolved in petitioner's favor by a jury. Petitioner's plea and motion on double jeopardy through collateral estoppel has been rejected by the Ohio State courts.

STATEMENT OF FACTS

This report includes a review of portions of the record and transcript from the proceedings against Petitioner in Richland County Court of Common Pleas. On the basis of that review this Magistrate finds that the statement of facts contained in the opinion of the Ohio Court of Appeals constitutes an accurate summary of the facts in Petitioner's case. Therefore, for the purpose of providing a factual background to this cause, and pursuant to Title 28, United States Code, section 2254(d), this Magistrate adopts the rendition of the facts as set forth by the court of appeals. *Sumner v. Mata,* 449 U.S. 539 (1981) (*Sumner* I); *Loveday v. Davis,* 697 F.2d 139 (6th Cir. 1983). The facts, as set forth by the Ohio Court of Appeals, are as follows:

> In April 1983, appellant Clarence Moyer, Jr., was indicted in Summit County on eight counts of receiving stolen property. Summit County Common Pleas Judge Glen Morgan, pursuant to appellant's request for a change of venue, transferred the case to Crawford County. Appellant was tried to a Crawford County jury in February 1984, and acquitted on all counts.
>
> On August 18, 1983, appellant, and appellant Moyers Auto Wrecking were each indicted and arraigned on thirteen counts of receiving stolen property in Richland County. On February 27, 1984, both appellants requested discovery and a Bill of Particulars, both of which had been filed on February 24, 1984. On March 9, 1984, appellants filed their motions to dismiss claiming double jeopardy and that the Richland County Grand Jury was without jurisdiction to hand down an indictment. Stipulations of Fact were filed April 5, 1984 and the State filed an Amended Bill of Par-

ticulars on June 4, 1984. On June 6, 1984, the trial court overruled both appellants' motions.

The facts recited by the state appellate court are elaborated by the following statement of facts which appeared in the Petitioner's memorandum which was submitted to the Supreme Court of Ohio and was incorporated into the State's memorandum:

> The Summit County thieves testified that Clarence Moyer received the parts to the stolen autos, knowing same to be stolen. Clarence Moyer took the stand, admitted that he received the parts, and denied knowing that they were stolen, stating that he believed that these were legitimate business transactions. At this time, the Summit County Prosecutor began to question Appellant about the allegations forming the basis of the Richland County indictment. Clarence Moyer denied knowing that the parts from Richland County were stolen stating his belief that these were legitimate business transactions, also. The Summit County prosecutor, relying upon Ohio Evidence Rule 404(B), then called upon rebuttal the leader of the Richland County thieves [Charles Long], who testified at great length as to the allegations that formed the basis of the Richland County indictments. The Richland County thief testified that he believed that Appellant knew that these parts were stolen.

(Appellant's Memorandum in Support of Jurisdiction to Ohio Supreme Court, page 3-4).

LAW AND ARGUMENT

At the outset, this Magistrate notes that the petition for habeas corpus relief is improperly brought under 28

U.S.C. § 2254.[1] That section applies only in post-trial situations to petitioners in custody, "pursuant to the judgment of a state court." 28 U.S.C. § 2254(b) (1982); *Robinson v. Wade*, 686 F.2d 298 (5th Cir. 1982); *Atkins v. Michigan*, 644 F.2d 543 (6th Cir. 1981); *Delk v. Atkinson*, 665 F.2d 90 (6th Cir. 1981). The petition is seeking pretrial relief. Such a claim is properly considered to arise under 28 U.S.C. § 2241[2] for petitioners, "in custody in violation of the constitution." 28 U.S.C. § 2241(c)(3) (1982). *Moore v. DeYoung*, 515 F.2d 437 (3d Cir. 1975); *Robinson v. Wade, supra; Atkins v. Michigan, supra.*

In spite of the fact that Petitioner has asserted the incorrect statute, this Magistrate finds that justice requires consideration of the petition solely on the ground that a claim of double jeopardy is asserted. The constitutional defense of double jeopardy represents an extraordinary circumstance warranting pretrial habeas corpus review. *Gully v. Kunzman*, 592 F.2d 283 (6th Cir. 1979), *cert. den.* 442 U.S. 924; *Robinson v. Wade, supra.* When a peti-

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1. 28 U.S.C. § 2254 provides in relevant part:

(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

2. 28 U.S.C. § 2241 provides in relevant part:

(c) The writ of habeas corpus shall not extend to a prisoner unless—

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; . . .

tioner has exercised all pretrial procedures available to him the power to review will be exercised despite the risk of interfering with state court proceedings. *Gully v. Kunzman, supra.* Exhaustion of state remedies is a prerequisite to invoking both sections 2254 and 2241. *Fain v. Duff,* 488 F.2d 218 (5th Cir. 1978); *Atkins v. Michigan, supra.*

This Magistrate notes that Petitioner has exhausted his state remedies. When a petitioner has exhausted his state remedies for the defense of double jeopardy then a pretrial petition for habeas corpus review may be entertained although improperly categorized by petitioner as post-conviction review or as a civil rights violation. *See, Gully v. Kunzman, supra; Robinson v. Wade, supra.*

Furthermore, Petitioner's release on his own recognizance constitutes custody eligible for protection of the writ of habeas corpus. *U.S. v. Garner,* 478 F.Supp. 1 (W.D. Tenn. 1979); *Hensley v. Municipal Court,* 411 U.S. 345 (1973); *Delk v. Atkinson, supra.* Therefore, a review of the merits of the ground for relief presented by the Petitioner is appropriate.

In his sole ground for relief, Petitioner maintains that he is in custody in violation of the fifth amendment guarantee from being placed twice in jeopardy. Petitioner contends the ultimate issue, his knowledge in purchasing stolen automobile parts from Charles Long, had been previously determined by the jury in Crawford County, and this issue cannot be relitigated.

The fifth amendment to the U.S. Constitution declares, "[n]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . ." The jeopardy clause provides three basic protections:

> It protects against a second prosecution for the same offense after acquittal. It protects against a second

> prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense.

Ohio v. Johnson, ... U.S. ....., 81 L.Ed 2d 425, 433 (1984); *North Carolina v. Pearce*, 395 U.S. 711 (1969). The underlying idea is that the state should not be allowed to make repeated attempts to convict an individual for an alleged offense, "subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." *Green v. United States*, 355 U.S. 184, 187-188 (1957). Furthermore, in *Ashe v. Swenson*, 397 U.S. 436 (1970), the court squarely held that collateral estoppel is embodied in the fifth amendment prohibition against double jeopardy. *Id.* at 445. This means that once an issue of ultimate fact has been determined by a valid and final judgment that issue cannot be relitigated between the same parties in any future lawsuit. *Id.* at 443. The rule of collateral estoppel in criminal cases which determines whether the prohibition against double jeopardy has been violated is as follows:

> Where a previous judgment of acquittal was based upon a general verdict, as is usually the case, this approach requires a court to "examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration." The inquiry "must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings." *Sealfon v. United States*, 332 U.S. 575, 579, 58 S. Ct. 237, 240, 92 L.Ed. 180 (1948).

Ashe v. Swenson, *supra*, at 444.

Another aspect of double jeopardy in multiple state court trials is that the state is considered to be a single sovereign. *Brown v. Ohio*, 432 U.S. 161 (1977); *Waller v. Florida*, 397 U.S. 387 (1970). Thus, the state cannot retry a defendant in different courts of the same state where the offense is the "same offense" under the double jeopardy clause. The result is that when there is "one course of criminal conduct" the state may not separate charges and pursue them separately in the courts of more than one county. *State v. Urvan*, 4 Ohio App. 3d 151 (Cuyahoga Cty. 1982); *Craig v. Engle*, 613 F. Supp. 782 (N.D. Ohio 1985).

A single course of criminal conduct occurs when the criminal incidents were part of the same criminal episode. *Oliphant v. Koehler*, 594 F.2d 547 (6th Cir. 1979); *Dombrowski v. Johnson*, 488 F.2d 68 (6th Cir. 1973). Thus, a single course of criminal conduct exists in the crime of receiving stolen property when the "defendant had no knowledge of the number of thefts and received the property in a single continuous transaction from the same source at the same time." *State v. Sanders*, 59 Ohio App. 2d 187, 192-93, 13 Ohio Op. 3d 209, 212 (Summit Cty. 1978).

In the Richland County Court of Common Pleas' record is the following stipulation of facts in the case pending before that court:

1. That assistant prosecutor Robert Konstam took over this case when assistant prosecutor Jim Ross moved to California in June, 1983;

2. Ross had been in contact with Summit County assistant prosecutor Annette Powers regarding similar cases in Summit County .

3. A meeting was held in the Summit County Prosecutor's Office in July or August, 1983, present were Richland County prosecutor John Allen, assistant prosecutor Robert Konstam, Summit County prosecutor Lynn Slaby and assistant prosecutor Annette Powers. The parties discussed their mutual investigations of Clarence Moyer and the purchase of stolen auto parts that originated or passed through Summit and Richland counties to the defendant's business, Moyer's Auto Wrecking in Crestline, Ohio (Crawford County);

4. During this same period police officers from Akron and Mansfield were in contact with each other and shared information concerning their investigations with relation to Clarence Moyer and Moyer's Auto Wrecking;

5. Contact between the two counties continued up to the time that the Summit County indictment was tried in Crawford County in February, 1984;

State v. Moyer, Case No. 83 CR 359 (Richland County Court of Common Pleas).

Obviously there was collaboration between the Summit County and Richland County Prosecutor's Offices. However, this is not enough for the imposition of collateral estoppel under the double jeopardy clause. The Petitioner has the burden to establish that the issue he seeks to foreclose from litigation in the present prosecution was necessarily decided in his favor by the prior verdict. *United States v. Cala,* 521 F.2d 605, 608 (2d Cir. 1975); *Craig v. Engle, supra,* at 785.

This Magistrate finds that Petitioner has not met this burden. The issue Petitioner seeks to foreclose is that

Petitioner did not purchase stolen automobile parts from Charles Long. In the Crawford County Common Pleas Court trial Petitioner denied having intent to purchase stolen automobile parts from Cori Mathews. (Appellee's Memorandum in Opposition to Jurisdiction to Ohio Supreme Court, page 15, 18). Charles Long testified at this trial as a witness to show absence of mistake. *Id.* at 13. Charles Long did not testify about transactions between Petitioner and Cori Mathews. He testified about other purchases, specifically the transactions between Petitioner and himself. *Id.* at 19-29. Charles Long admitted he stole automobile parts and sold them to Petitioner. *Id.* However, this was testimony on other crimes pursuant to Rule 404(B) of the Ohio Rules of Evidence. This rule allows the admission of testimony of other crimes to prove motive, opportunity, intent, preparation, plan, knowledge, identify, or absence of mistake or accident. OHIO R. EVID. 404(B). Clearly, Charles Long testified about crimes other than those charged in the Crawford County trial. Therefore, the jury's acquittal in the Crawford County case could have grounded its verdict upon another issue, whether Petitioner purchased stolen automobile parts from Cori Mathews. This is not the issue Petitioner seeks to foreclose. Petitioner has not met his burden in establishing that this issue was necessarily decided in his favor by the prior verdict.

Furthermore, Petitioner has failed to establish that the indictments originating in Summit and Richland Counties were based upon "one course of criminal conduct." The appellate court held:

> The crimes appellant was acquitted of in Crawford County on the Summit County indictment involve separate and distinct factual transactions from those involved in the Richland County indictments. We

> find that Clarence Moyer's mental state, if in fact he received parts from Cori Mathews, is distinct and separate from his mental state when dealing with, if he did deal with, Charles Long.
>
> There is no evidence before the court to show that appellants' alleged acts in both indictments were of a continuous course of conduct. Furthermore, the two jurisdictions did not indict at the same time or treat the two cases as one.

State v. Moyer, Case No. CA2245 (Fifth Appellate District, 1984).

This Magistrate finds that the state is not attempting to separate charges and pursue them separately in different counties. The evidence presented in the Crawford County trial could not have established that there was one transaction from the same source. There were at least two independent sources, Cori Mathews and Charles Long. Furthermore, the charges in the two counties are based on different episodes. There is no evidence in the record that the alleged acts of receiving stolen property occurred simultaneously or were somehow part of the same transaction. There is no evidence that Cori Mathews and Charles Long knew of one another before the indictments. From the evidence presented in Crawford County the only reasonable conclusion was that Cori Mathews and Charles Long transacted their business independently with Petitioner and not as "one course of criminal conduct."

Petitioner relies on cases which are readily distinguishable. In *State v. Urvan, supra,* the two separate sets of charges arose from the theft of property from a single victim. *Compare, Craig v. Engle, supra.* In *Ashe v. Swenson, supra,* the accused had allegedly robbed six poker

players in the same incident. In *Waller v. Florida, supra,* successive charges were brought in another court, which arose from a single theft of a mural from city hall. In *United States v. Robinson,* 588 F.2d 1041 (5th Cir. 1979), the court found that the two gambling operations in Amarillo and Dallas-Fort Worth were so intertwined that it was impossible to separate them. There is no demonstration of a common incident underlying the Richland County and Summit County indictments, nor inseparable intertwinement of the transactions between Petitioner, Mathews, and Long. Collateral estoppel is not to be applied across the board to bar subsequent criminal prosecutions. *Craig v. Engle, supra.*

The Petitioner has failed to carry his burden demonstrating that he is threatened with being placed twice in jeopardy by the pending prosecution in Richland County, Ohio. Consequently, this Magistrate concludes that Petitioner's sole ground for relief is without merit and should be dismissed.

CONCLUSION AND RECOMMENDATION

Following a thorough review of the record, pleadings, and applicable law, this Magistrate arrives at the following conclusions:

1. Petitioner has failed to demonstrate that he is in custody in violation of the constitution, laws, or treaties of the United States as required by Title 28, United States Code, sections 2254 and 2241. *Allen v. Perini,* 424 F.2d 134 (6th Cir. 1970); *Atkins v. Michigan,* 644 F.2d 543 (6th Cir. 1981).

2. An evidentiary hearing is not required under the criteria set forth in *Townsend v. Sain,* 372 U.S. 293 (1963).

Therefore, this Magistrate respectfully recommends that Petitioner's application for habeas corpus be denied and dismissed.

/s/ CHARLES R. LAURIE
United States Magistrate

ANY OBJECTIONS to this Report and Recommendation must be filed with the Clerk of Courts within ten (10) days of receipt of this notice. Failure to file objections within the specified time waives the right to appeal the District Court's order. *See United States v. Walters*, 638 F. 2d 947 (6th Cir. 1981).

CERTIFICATION

I hereby certify that a copy of the foregoing instrument has been forwarded to John W. Allen, Prosecuting Attorney, 38 South Park Street, Mansfield, Ohio 44902, and to Gerald J. Glinsek, 88 South Portage Path, Suite 301, Akron, Ohio 44303, John Spiegal, Box 1024, Bucyrus, Ohio 44820, and Elizabeth Reilly, 201(d) West, University of Akron School of Law, Akron, Ohio 44325, attorneys for Petitioner, this 14th day of January, 1986, by regular United States Mail.

/s/ CHARLES R. LAURIE
United States Magistrate

JUDGMENT ENTRY OF OHIO SUPREME COURT RE MOTION FOR LEAVE TO APPEAL FROM THE COURT OF APPEALS OF RICHLAND COUNTY

(Filed April 29, 1985)

Case No. 85-66

THE SUPREME COURT OF OHIO
COLUMBUS

STATE OF OHIO,
Appellee,

v.

CLARENCE MOYER,
Appellant.

JUDGMENT ENTRY

Upon consideration of the motion for leave to appeal from the Court of Appeals for Richland County, and the claimed appeal as of right from same said Court, it is ordered by the Court that said motion is overruled and the appeal is dismissed sua sponte for the reason that no substantial constitutional question exists therein.

/s/ FRANK D. CELEBREZZE
Chief Justice

OPINION OF THE COURT OF APPEALS OF RICHLAND COUNTY, OHIO

(Filed November 19, 1984)

Case No. CA 3245

COURT OF APPEALS
RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO,
Plaintiff-Appellee,

vs.

CLARENCE MOYER and MOYER'S AUTO WRECKING,
Defendants-Appellants.

OPINION

TURPIN, J.

In April 1983, appellant, Clarence Moyer, Jr., was indicted in Summit County on eight counts of receiving stolen property. Summit County Common Pleas Judge Glen Morgan, pursuant to appellant's request for a change of venue, transferred the case to Crawford County. Appellant was tried to a Crawford County jury in February 1984, and acquitted on all counts.

On August 18, 1983, appellant, and appellant Moyer's Auto Wrecking were each indicted and arraigned on thirteen counts of receiving stolen property in Richland County. On February 17, 1984, both appellants requested discovery and a Bill of Particulars, both of which had been filed on February 24, 1984. On March 9, 1984, appellants filed their motions to dismiss claiming double jeopardy

and that the Richland County Grand Jury was without jurisdiction to hand down an indictment. Stipulations of Fact were filed April 5, 1984 and the State filed an Amended Bill of Particulars on June 4, 1984. On June 6, 1984, the trial court overruled both appellants' motions. Appellants filed their notice of appeal to this court claiming two assignments of error as follows:

ASSIGNMENT OF ERROR NO. I.

THE TRIAL COURT ERRED IN OVERRULING DEFENDANTS-APPELLANTS' MOTIONS TO DISMISS THE INDICTMENT, BECAUSE INDICTING THESE DEFENDANTS VIOLATED THEIR RIGHT TO BE FREE FROM DOUBLE JEOPARDY.

ASSIGNMENT OF ERROR NO. II.

THE TRIAL COURT ERRED IN OVERRULING DEFENDANTS-APPELLANTS' MOTIONS TO DISMISS THE INDICTMENT BECAUSE THE RICHLAND COUNTY COMMON PLEAS COURT LACKED SUBJECT-MATTER JURISDICTION OVER ALLEGED CRIMES COMMITTED IN ANOTHER COUNTY. *State v. Centers,* (1983) Delaware App. No. 82-CA-38, unreported.

I.

The first assignment of error is overruled. The crimes appellant was acquitted of in Crawford County on the Summit County indictment involve separate and distinct factual transactions from those involved in the Richland County indictments. We find that Clarence Moyer's mental state, if in fact he received parts from Cori Mathews, is distinct and separate from his mental state when dealing with, if he did deal with, Charles Long.

There is no evidence before the court to show that appellants' alleged acts in both indictments were of a continuous course of conduct. Furthermore, the two jurisdictions did not indict at the same time or treat the two cases as one.

II.

The second assignment of error is overruled. The Richland County indictment alleges that appellant, aided and abetted others, and also that said property had been taken, received or enticed from or into Richland County. The Amended Bill of Particulars states that all of the automobiles stolen were delivered into and disassembled in Richland and then delivered to the appellants in Crawford County; that Charles Long, James McCoy and the appellant had an agreement on the delivery of the stolen car parts; and that four of the thirteen automobiles were actually stolen in Richland County.

We find that the Richland County indictment has sufficient allegations as to both jurisdiction and venue.

State v. Centers, (1983) Delaware App. No. 82-CA-88, unreported, does not apply in this case.

For the reasons stated both assignments of error are overruled, the judgment of the Court of Common Pleas of Richland County, Ohio is affirmed and this cause is remanded to that court for further proceedings according to law.

Milligan, P.J. and
Wise, J. concur.

/s/ Ira G. Turpin
/s/ John R. Milligan
/s/ Earle E. Wise
Judges

IGT/lb

JUDGMENT ENTRY OF THE COURT OF APPEALS OF RICHLAND COUNTY, OHIO

(Filed November 19, 1984)

Case No. CA-2245

IN THE COURT OF APPEALS
FOR RICHLAND COUNTY,
OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO,
Plaintiff-Appellee,

vs.

CLARENCE MOYER and MOYER'S
AUTO WRECKING,
Defendants-Appellants.

JUDGMENT ENTRY

For the reasons stated in the Memorandum-Opinion on file, the judgment of the Court of Common Pleas of Richland County, Ohio is affirmed, and this cause is remanded to that Court for further proceedings according to law.

/s/ IRA G. TURPIN
/s/ JOHN R. MILLIGAN
/s/ EARLE E. WISE
Judges

JUDGMENT ENTRY OF THE COURT OF COMMON PLEAS

(Filed May 22, 1984)

Case No. 83 CR 359

IN THE RICHLAND COUNTY
COMMON PLEAS COURT

STATE OF OHIO,

v.

CLARENCE MOYER

and

MOYERS AUTO WRECKING,

Defendants.

JUDGMENT ENTRY

This matter came on for consideration of the two motions to dismiss filed on behalf of the Defendants.

As to the first motion to dismiss, because of former jeopardy, it is ORDERED, ADJUDGED, AND DECREED that the same is overruled.

As to the second motion to dismiss, because of lack of jurisdiction, it is ORDERED, ADJUDGED, AND DECREED that the State of Ohio shall prepare and file an amended bill of particulars to show operative facts alleged, if any, which are alleged to have occurred in Richland County, Ohio. The Court will defer deciding this issue until said amended bill of particulars is filed and further arguments had, which arguments are scheduled for June 4, 1984, at 3:00 PM.

Exceptions preserved.

/s/ MAX K. CHILCOTE
Judge
Common Pleas Court

ORDER STAYING MANDATE OF UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

(Filed January 21, 1987)

No. 86-3243

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CLARENCE MOYER, JR.,
Petitioner-Appellant,

VS.

RICHARD PETTY, SHERIFF OF RICHLAND COUNTY, OHIO,
Respondent-Appellee.

ORDER STAYING MANDATE

Upon consideration, it is ORDERED that the motion to stay issuance of the mandate pending application to the Supreme Court for writ of certiorari is hereby granted and the mandate is stayed until the date on which the movant's application for a writ of certiorari must be filed pursuant to 28 U.S.C. Section 2101 or Rule 20 of the Supreme Court Rules, as applicable. However, if within such time, the applicant shall file with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed, the stay shall continue until the final disposition of the case by the Supreme Court. Upon the filing of a copy of an order denying the writ applied for, the mandate shall issue.

ENTERED BY ORDER OF THE COURT
John P. Hehman, *Clerk*
/s/ JOHN P. HEHMAN

EXCERPTS OF TRIAL TRANSCRIPT

CROSS EXAMINATION OF CLARENCE MOYER

[187] Q. Have you ever had any stolen T-tops in your office? A. No.

Q. In the back office you never kept door panels, inside door panels that were hot? A. No.

Q. Do you ever sell or salvage automobiles? A. The ones with titles, yes.

Q. And do you buy those back with different parts on them and resell them? A. No.

Q. You have never sold a 1979 El Camino?

Mr. Glinsek: Objection. May we approach the bench?

(A conference was had between court and counsel out of the hearing of the jury as follows:)

Mr. Glinsek: I don't know what she's getting into. I think she's getting into the Richland County Case. The Prosecutor from Richland County has been sitting here through this trial and I think she is trying to interject the indictment in Richland County into this case to cover a lack of evidence that she has got in her own case.

The Court: What are you getting at?

Ms. Powers: Your Honor, he has clearly stated that he runs a very legitimate business and that he has never [188] done any of these things so either they made a mistake or it was an accident that these things happened.

The Court: Okay, but you are asking about another crime here; aren't you?

Ms. Powers: Your Honor, if he denies ever having stolen parts or priming VIN numbers on engines or making

sure that the federal stickers are removed from doors, then I certainly have rebuttal testimony to that effect and this also goes to show his credibility.

Mr. Glinsek: But the point I am getting at is you are asking questions concerning other criminal actions.

The Court: If she has evidence to prove this, I don't see any problem.

Mr. Spiegel: Your Honor, referring to 404(B) and 2945.59 in the Evidence Rules it says, in part, evidence of other crimes is not admissible to prove character. And it says it may be admitted for the purpose of showing motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. She is, I believe, trying to prove character here.

Ms. Powers: Your Honor, it goes to prove motive. He was dealing out of his pocket. He never looks at the parts because he knows he can make some money on them. It sounds to me like it was his intent to buy stolen goods. I can clearly show that he knowingly received stolen property [189] and that he knowingly issued phoney receipts and made sure VIN numbers were punched out and painted over. I can clearly show that he has told people to keep their mouth shut about this operation and this is someone who has known him for fifteen years.

The Court: And you are going to bring in witnesses who have personal knowledge of this?

Ms. Powers: Absolutely.

Mr. Glinsek: Who is this witness?

Ms. Powers: Charlie Long.

Mr. Glinsek: That is a name I have never heard before. She has told me that the witnesses that were tes-

tifying were Ernie Hall, Earl Likely, Cory and Andrea. Charlie Long has never been mentioned to me.

Ms. Powers: You never told me that Mr. Moyer was going to take the stand.

Mr. Glinsek: You always knew the Defendant may possibly testify.

Ms. Powers: This is in addition. No one ever told me the Defendant was going to testify and I didn't get upset about it. He denied everything so, you know, he is entitled to be breached on that. It goes to prove the Defendant's motive and monetary gain. I believe he stated himself, "I knew I could make some money on them, so I don't look at them."

[190] The Court: Charles Long, isn't he the one indicted over in Richland County?

Ms. Powers: I met with him last night. And you have seen him over at the yard too.

Mr. Glinsek: I have seen him over at the yard?

Ms. Powers: I think you have. Your Honor, Charles Long will be able to testify about the van out back and the hot parts and the place out back where the hot parts are where they are not allowed to go, that it is locked; about the stolen T-tops and things that Moyer said to him like, "Don't steal that, it's too close to home."

The Court: Was Charlie Long convicted?

Ms. Powers: It is my understanding from the Richland County Prosecutor that he was convicted or perhaps entered a plea.

Mr. Glinsek: He certainly hasn't been sentenced.

Ms. Powers: I don't know about sentence. But he has been convicted in the Richland County case.

Mr. Spiegel: We will make a Motion in Limine here. I have a couple of specific cases from our Ninth District that is exactly on point where a person says, "Yes I had the goods, but I didn't know what they were." I will have copies made for you but they are right on point here. The [191] case here is whether or not he had reasonable cause to believe—

The Court: He said, "If I purchased them, I purchased them by mistake." She is trying to show absence of mistake. Overruled.

(The following proceedings was had in the presence of the jury.)

The Court: Objection is overruled.

Q. (By Ms. Powers) Mr. Moyer, do you deny ever spray painting over or priming over, particular diesel engine VIN numbers where you can clearly see that the VIN number has been punched out? A. I don't paint over them.

Q. You deny that you spray paint over where the VIN numbers have been punched out? A. Yes.

Q. You deny that? A. Um hum.

Q. Mr. Moyer that nut cracker machine you have out back comes in pretty handy doesn't it? A. Yes, for what we use it for yes.

Q. In other words, anything that has a VIN number or anything you want to crush up real quick the nut cracker machine can do that?

Mr. Glinsek: Objection.

* * * * *

[199] Q. These dates that she is referring to, those are her recollection; isn't that true? A. Yes.

Q. Do you recall any specific date that you met Vince Cumby? A. No, sir.

Q. You are answering then in response to dates that she has given you? A. Yes.

Q. It's like Cory Mathews did yesterday? A. I don't know about Cory Mathews.

The Court: All right, you may step down.

CHARLES L. LONG called as a witness on behalf of the State of Ohio, after being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION ON REBUTTAL

By Ms. Powers:

Q. Sir, will you state your name please? A. Charles L. Long.

Q. And, where do you live? A. 46 East Main, Greenwich.

Q. Charley would you pull the mike closer to you so that we can all hear you.

[200] Q. How old are you? A. Twenty-two.

Q. And, are you married? A. Yes.

Q. Do you have any children? A. No.

Q. What kind of work do you do? A. Auto body.

Q. And, do you have a place of business? A. Yes.

Q. And, where is that located? A. 46 and a half East Main, in the rear.

Q. And how long have you been doing that kind of work? A. Ever since, I'd say, on and off over the years with my father.

Q. What kind of work does your dad do? A. Auto body.

Q. Where did you go to school? A. I went to a joint vocational school there.

Q. Did you take any auto body courses there? A. No.

Q. From whom did you learn the trade? A. From my father.

Q. Do you know Mr. Clarence Moyer? A. Yes.

[201] Q. How do you know Mr. Moyer? A. From my father buying parts from him.

Q. Okay and how long have you known him? A. Ever since I can remember, which has been probably fifteen years.

Q. How often on a regular basis in the past two years, would you see Mr. Moyer? A. Quite frequently.

Q. And what was your relationship with him? A. Business.

Q. And, would you explain the nature of your business with Mr. Moyer? A. Going over there and buying parts for my father and taking him stolen parts.

Q. Taking him stolen parts. Would you please tell us who stole the parts you are talking about? A. Me and Jim McCoy (spelling unconfirmed) and some other people.

Q. Would you say that you were an employee of Mr. Moyer's? A. I don't know if you could say that, but I did take him all the parts that we got from the cars.

Q. Okay, in regard to the layout of the auto wrecking place, can you please tell us where, on the premises, you were permitted to go? A. Pretty much wherever I wanted to go.

[202] Q. Will you please tell us about the building that has a dirt floor in it where all the engines were kept, and can you explain to us about the engines? A. Some of them had the numbers punched out and some of them didn't.

Q. Charley, can you explain to us, when talking about an engine with the number punched out, can you tell us what number had been punched out? A. It sort of blends in the casing when it comes from the factory and you can punch them out if you do it right.

Q. If the number is there, can you see it? A. Yes.

Q. Are there any other numbers on the engine or stickers? A. There are stickers on the valve coils which they can run through computers and trace back to the truck or car.

Q. Charley, if you will try to pronounce your words a little more carefully. Back here your words are running together. We want everyone to hear you please.

Have you ever delivered any stolen engines to that particular building? A. A few.

Q. And, can you please tell us how this involved Mr. Moyer? A. I would take it over there in a truck and he would [203] look over them and have someone unload them.

Q. Were the VIN numbers punched out on the engines? A. Every one of them.

Q. Did Mr. Moyer look at these engines? A. Yes, he would look and I'd tell him I detailed them out.

Q. What does "detail them out" mean? A. Get rid of the numbers on them and the stickers and cover them.

Q. How do you get rid of the numbers and cover them up? A. Punch and hammer and I'd cover it with rust proofing or paint.

Q. Did Mr. Moyer ever work on these engines with rust proofing? A. I have seen him look at them and seen him once take a can of paint to one.

Q. And, what did he do with the can of paint? A. Spray it.

Q. Where? A. The number.

Q. What kind of paint was used? A. It was a spray bomb paint, aerosol can.

Q. Is that what you use to spray over the punched out VIN numbers? A. If I had the right color.

[204] Q. Do you then try to match the color of the engine? A. Yes. If I can't match it then you rust proof them.

Q. Did you steal any diesel engines Charley? A. About five or six of them.

Q. What happened to those diesel engines? A. They all went to Moyers.

Q. Directing your attention to June of '82, does the name Mr. Gilbert ring a bell with you? A. Yes.

Q. Who is Mr. Gilbert? A. He was who had received one of the diesel trucks and called me for tires because he was interested—

Mr. Glinsek: Objection.

The Court: Overruled.

Q. Did you steal the diesel engine Mr. Gilbert received? A. I, myself didn't steal it, but one of the other guys stole it.

Mr. Glinsek: Objection.

The Court: If he knows. Overruled.

Q. Do you have personal knowledge of the theft of this engine? A. Yes.

Q. Did you see it? A. Yes.

[205] Q. Did you handle it? A. Yes.

Q. What happened to the VIN number on that diesel engine? A. The numbers were punched out.

Q. Did you personally observe them? A. I punched them out myself and covered them with undercoating.

Q. Did Mr. Moyer see this engine? A. Yes.

Q. And, did you have any conversations with Mr. Moyer regarding this engine? A. The only conversation I had with him was they needed a diesel motor and that he'd like to have it on the following Monday. And, that was a nice one.

Q. Did you have any conversation with him in regard to Mr. Gilbert? A. He told me that if Mr. Gilbert asked where it come from that I got it at the salvage pool.

Q. I'm sorry, repeat that. A. That I was to tell Mr. Gilbert if he asked any questions, that I had gotten it at the salvage pool.

Q. Were there any trailers or semi-trailers ever parked on Mr. Moyer's premises? A. There's several of them over there.

[206] Q. And, do you have any personal knowledge of those trailers? A. A few of them.

Q. Can you tell us about those that you have personal knowledge of and give us the time frame? A. The one was where all the engines were put and another one had a large amount of trunk lids and doors and sometimes front ends in it.

Q. Was anything wrong with that? A. Yes, all of them were all the same color. Where two doors match and the front end and the trunk lids and all the other parts are the same.

Q. Where they looked like they had come off of one car? A. It was the main shell of a car.

Q. These were all matched parts; that's what you are saying? A. Yes.

Q. Do you know what Federal stickers are? A. Yes.

Q. What are those? A. On the doors, it tells the production date and the serial number of the car. And, they were always removed from the doors that were in the trailer.

Q. Charley, what was your procedure when you would bring in some stolen goods to Mr. Moyer? How would you [207] deliver them? A. Take them over in a truck, covered up; let the truck sit outside the gate and tell J.R. I was there and I had parts and he would tell me where to drop them off in the yard and have someone, like on the engines, with a wrecker truck, pick them up out of the truck.

Q. In other words, they would go from your truck to where? A. Usually on the ground, or into a building.

Q. Was that always the case? A. No.

Q. Would you explain please? A. There was a five point seven liter diesel that went from my truck to another truck.

Q. Was that diesel engine stolen? A. Yes.

Q. Do you recall when you did that? A. It's been back in the summer of '82.

Q. Did Mr. Moyer inspect that diesel engine? A. He looked at it but I don't remember how closely he looked at it and he had a guy write me out a check for it.

Q. Was the engine number punched out? A. Oh, yes.

Q. Did you spray paint that engine? A. No, it was one that wasn't spray painted.

[208] Q. Why didn't you spray paint that engine? A. Because the VIN on that was hidden by the power steering pump.

Q. Have you ever stolen any Corvette T-tops? A. No.

Q. Have you had dealings with any T-tops at all? A. Once.

Q. And, what was that please? A. A 1982 Firebird.

Q. And where did this T-top go? A. Went to J.R.'s.

Q. Could you be more specific please, Charley? A. Took them over to J.R.'s and they were put in J.R.'s personal office.

Q. Do you know what happened to them? A. No.

Q. Did Mr. Moyer see those T-tops? A. Yes.

Q. Charley, within your personal knowledge, did you receive any receipts for any of the goods you sold to Mr. Moyer? A. Not for the goods I sold. I received receipts for parts that I never bought.

Q. Can you explain that please?

Mr. Glinsek: Objection.

[209] The Court: Overruled.

Q. What kind of receipts did you receive? A. I had to get receipts for the State Highway Patrol Inspections.

Q. And were they numbered? A. Some were numbered and some were unnumbered.

Q. Why did you need these receipts for the State Highway Inspections? A. Because they're required.

Q. Excuse me Charley, is the person that you refer to as J.R. and called Mr. Moyer, is he present in the courtroom? A. Yes.

Q. And, will you please identify him? A. The man in the white sweater, with the glasses on.

The Court: Is he at the defendant's table with a man on each side of him?

The Witness: Yes.

The Court: He has identified the Defendant.

Q. (By Ms. Powers) Charley, do you know anything about a dump truck on the premises or how it is used? A. I have just seen dump trucks going in there when things were supposed to be hot, picking up stuff out of

the one building, which was the engines and the transmissions.

Q. Was Mr. Moyer present at the time? [210] A. He was wondering [sic] around the yard.

Q. Did you personally observe whether or not he saw the dump truck? A. Yes, because he talked to the driver.

Ms. Powers: Thank you. That's all I have.

CROSS EXAMINATION ON REBUTTAL

By Mr. Glinsek:

Q. You are a thief, right? A. Right.

Q. Are you a liar too? A. Never have been.

Q. You wouldn't lie under oath? A. No.

Q. Would you lie to people when you aren't under oath? A. Depends on who it was.

Q. And it depends upon what you are trying to do; right? A. I wouldn't lie if you was buying parts from me. I wouldn't lie to you.

Q. But, if you were selling stolen parts, you might? A. No.

Q. No. You went and told everybody that you deal with that you have stolen parts? A. Yes.

Q. Flat out?

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